

JUL 12 1993

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July 12, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket No. 93-178
Howard B. Dolgoff
File No. BPH-911223ME

Dear Mr. Caton:

Submitted herewith for filing, on behalf of our client, Howard B. Dolgoff, an applicant in the above-referenced comparative hearing proceeding (MM Docket No. 93-178), are an original and six (6) copies of his Opposition To Request To Certify Application For Review in the proceeding. Kindly refer this letter and its enclosure to Administrative Law Judge John M. Frysiak.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &
HANDLER

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

JUL 12 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

HOWARD B. DOLGOFF and

MARK AND RENEE CARTER

For a Construction Permit For a
New FM Radio Station on Channel
292A in Miramar Beach, Florida

MM Docket No. 93-178

File No. BPH-911223ME

File No. BPH-911224MD

TO: Administrative Law Judge John M. Frysiak

OPPOSITION TO REQUEST TO CERTIFY APPLICATION FOR REVIEW

HOWARD B. DOLGOFF ("DolgoFF"), an applicant in the above-captioned proceeding, by his attorneys, pursuant to Section 1.115(e)(3) of the Commission's Rules, hereby submits his instant Opposition to the "Request To Certify Application For Review" ("Request"), filed herein on July 6, 1993, on behalf of Mark and Renee Carter (the "Carters"). In support whereof, it is shown as follows:

The Carters contend that the Mass Media Bureau erred, in its Hearing Designation Order, __ FCC Rcd __, DA 93-700 (Mass Media Bureau released June 28, 1993), in this proceeding by denying their June 4, 1992 Petition To Deny DolgoFF's application and by designating DolgoFF's captioned application for a consolidated comparative hearing with the Carters' application. The claimed in their Petition To Deny, that DolgoFF's invocation of and request for processing pursuant to Section 73.213 of the Commission's Rules with respect to spacing to Radio Station WKNU(FM), Channel 292A in Brewton, Alabama, was inappropriate. While now appearing to acknowledge, in their Request, that processing of DolgoFF's application pursuant to Section 73.213 was proper, the Carters nonetheless persist in claiming that the DolgoFF application should have been dismissed because (a) DolgoFF's May 4, 1992 technical amendment to his application did not request processing pursuant to Section 73.215 of the Commission's Rules, and (b) the showings necessary to support a request for processing under Section 73.215 of the Rules were not supplied by DolgoFF in that amendment. Based on the foregoing, the Carters argue that DolgoFF's May 4, 1992, amendment to his application was unacceptable and that, therefore, DolgoFF's entire application should have been dismissed as unacceptable.

These contentions were fully rebutted by Dolgoff in his July 9, 1992 Opposition To Petition To Deny, in which Dolgoff showed that the Carters' arguments were totally devoid of merit. Dolgoff's July 9, 1992 Opposition To Petition To Deny is hereby incorporated herein by reference.¹ In its Hearing Designation Order herein, the Mass Media Bureau rejected the Carters' contentions and denied their Petition To Deny. The Bureau there affirmed Dolgoff's contention that Dolgoff's amended application may properly be processed pursuant to Section 73.213(c)(1) with respect to WKNU(FM). In this regard, the Bureau held in its Hearing Designation Order that Dolgoff's application, as amended, proposed no more than an effective radiated power/antenna height combination of 3 kW/100 meters above average terrain, or equivalent, in the arc toward WKNU(FM), and that, therefore, the Dolgoff proposal fully complied with Section 73.213 of the Commission's Rules. In this regard, the Hearing Designation Order contained the following reasoning for the Bureau's determination:

"When applying Section 73.213(c)(1), it has been staff practice to accept radiation limitations equivalent to the old Class A limit (3 kW/100 m HAAT or equivalent) in the arc toward the short-spaced station. In the instant case, Dolgoff's application specifies 6 kilowatts ERP, but proposes only 3 kilowatts in the arc toward the short-spaced station (WKNU) by utilizing a directional antenna. Therefore, by applying the rule on a station-to-station basis, Dolgoff's proposal is not in violation of the provisions of Section 73.213(c)(1). Accordingly, the Carters' Petition To Deny filed against the Dolgoff application will be denied."

Hearing Designation Order at ¶3.

The Carters appear to contend that the Bureau should have held that the only way that Dolgoff could comply with Section 73.213(c)(1) of the Commission's Rules was to specify omnidirectional transmitting facilities with a maximum effective radiated power ("ERP") of no more than 3 kW in any direction. This is hardly a surprising contention from the Carters since they propose exactly such limited technical facilities, and, as the Bureau recognized in its Hearing Designation Order, "there would be a significant difference in the size of the areas and populations which would receive service from the [Dolgoff and the Carters] proposals." Hearing Designation Order at Paragraph 5. The

¹ For the convenience of the Presiding Judge, a copy of Dolgoff's July 9, 1992 Opposition To Petition To Deny is annexed hereto as Attachment 1.

Carters could have specified technical facilities equivalent to those specified by Dolgoff in his May 4, 1992 amendment, but failed to do so, for reasons best known to them and their counsel. Thus, not

surprisingly, the Carters seek to have Dolgoff's application dismissed so that they can avoid any

In sum, for the reasons set forth above and in Dolgoff's annexed Opposition To Petition To Deny, the Bureau was correct in its conclusion that Dolgoff's May 4, 1992 amendment was acceptable under Section 73.213(c) of the Commission's Rules. The Carters have not demonstrated that the Bureau erred or did not follow applicable precedent in reaching this determination. Indeed, the Carters have not challenged the Bureau's statement, in its Hearing Designation Order, that "... when applying Section 73.213(c)(1), it has been staff practice to accept radiation limitations equivalent to the old Class A limit ... in the arc toward the short-spaced station." Id. at ¶13. Nor do the Carters cite to any precedent in which the Bureau has taken a different position, since, manifestly, no such contrary precedent exists, to Dolgoff's best knowledge.

More importantly, the Hearing Designation Order contained a reasoned analysis by the Bureau

otherwise acceptable application in such a fashion that acceptance of the amendment would necessitate the dismissal of the application, the Commission will return the amendment and will consider the applicant's application as filed without the amendment in question. See, e.g., Great Scott Broadcasting, 6 FCC Rcd 2168 (Mass Media Bureau 1991); Barbara Key Peel, 6 FCC Rcd 2833 (Mass Media Bureau 1991); Pike Family Broadcasting, Inc., 6 FCC Rcd 5552 (1991); Golden Shores Broadcasting, Inc., 2 FCC Rcd 4743 (1987). Not surprisingly, the Carters fail to acknowledge the existence of this line of precedent. In light of this well-established policy on so-called "suicide amendments", even if it were to be assumed, arguendo, that the Carters were correct in their contention that Dolgoff's May 4, 1992 amendment to his application was unacceptable, the only proper remedy that could properly have been invoked, consistent with Commission policy, would have been rejection of that amendment, so that the unamended Dolgoff application would continue to be processed and, ultimately, designated for hearing.

Thus, under any method of analysis, there is no merit to the Carters' contention that Dolgoff's application should have been dismissed by the Bureau. Hence, the Carters' instant Request for certification to the full Commission does not present a "controlling question of law as to which there is substantial ground for difference of opinion". In any event, notwithstanding the Carters' claims to the contrary, immediate consideration of the questions posed by the Carters in their certification Request would not "materially expedite the ultimate resolution of [this] litigation." See Section 1.115(e)(3) of the Commission's Rules. It should be emphasized, in this regard, that the only issues presented in this proceeding are those which are specifically designated by the Bureau in its Hearing Designation Order herein. The Carters have not demonstrated, nor could they demonstrate, how any expedited resolution by the Commission of the issues which they raise in their instant certification Request would materially expedite ultimate resolution of the specific hearing issues designated by the Bureau in this proceeding. Although the Carters contend that grant of the relief that they seek (viz., dismissal of Dolgoff's application) would somehow "expedite" this proceeding by obviating the necessity for any comparative hearing, this is not a relevant consideration under the standard of review set forth in

Subsection 1.115(e)(3) of the Commission's Rules. It is well-established that the public interest is best served by giving the Commission the widest choice from among qualified competing applicants.

Azalea Corp., 31 FCC 2d 561 (1971). Moreover, an applicant in a comparative hearing proceeding has no "vested interest" in the disqualification of a competing applicant. See Crothwait v. FCC, 584 F.2d 550, 555 (D.C. Cir. 1978). The Carters' certification Request is nothing more than an invitation to circumvent these well-established policies; the Presiding Judge should decline such invitation.

In light of all the foregoing, it is manifest that the Carters' Request for certification is so devoid of merit as to be frivolous and to border on abuse of process. The Carters' Request represents desperation tactics by the Carters' in an effort to avoid, at all costs, a comparative hearing with Dolgoff. For the reasons set forth above, the Carters' Request To Certify Application For Review is procedurally defective and substantively devoid of merit and should be summarily denied.

Respectfully submitted,

HOWARD B. DOLGOFF

By: 

Irving Gastfreund

Kaye, Scholer, Fierman, Hays &
Handler
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

His Attorneys

July 12, 1993

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July 9, 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Application of Howard B. Dolgoff
For a Construction Permit For a
New FM Radio Station on Channel 292A
In Miramar Beach, Florida
(FCC File No. BPH-911223ME)

Dear Ms. Searcy:

Submitted herewith for filing, on behalf of our client, Howard B. Dolgoff, the above-referenced applicant for a construction permit for a new FM radio station on FM Channel 292A in Miramar Beach, Florida, are an original and four copies of his Opposition To Petition To Deny in the above-referenced matter.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By: 

Irving Gastfreund

Enclosure

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In re Application)

HOWARD B. DOLGOFF)

) File No. BPH-911223ME

)
) For a Construction Permit For a
) New FM Radio Station on
) Channel 292A in Miramar Beach,
) Florida.
)

TO: Chief, Mass Media Bureau

OPPOSITION TO PETITION TO DENY

HOWARD B. DOLGOFF ("Dolgooff"). by his attorneys. hereby

to Radio Station WKNV(FM), Channel 292A in Brewton, Alabama, is unauthorized and inappropriate. The Carters further claim that the Dolgoff application does not request processing pursuant to Section 73.215 of the Commission's Rules, and that the showings necessary to support a request for processing under Section 73.215 of the Rules have not been supplied by Dolgoff. Based on the foregoing, the Carters argue that Dolgoff's amendment to his application, filed with the Commission on May 4, 1992, should be rejected.

For the reasons set forth below, the arguments of the Carters are totally devoid of any merit whatsoever. As will be shown below, Dolgoff properly relied on processing pursuant to Section 73.213 of the Commission's Rules with respect to spacing in relation to WKNV(FM). The Carters' arguments to the contrary reflect, at best, a complete misunderstanding of applicable Commission rules (thereby reflecting on the Carters' ineptness) or, at worst, a willingness to engage in abuse of process by filing pleadings that they know have absolutely no merit. The Carters' Petition To Deny should be summarily dismissed or denied without consideration.

II. Argument

In Miramar Beach, Florida, 6 FCC Rcd 5778 (Mass Media Bureau 1991), the Commission's Mass Media Bureau amended the FM Table of Allotments to add a new Channel 292A to Miramar Beach, Florida.

The Miramar Beach allotment, which is the subject of Dolgoff's and the Carters' applications, was first proposed by the Carters themselves prior to October 2, 1989 -- i.e., before the adoption of the new distance separation requirements for Class A FM stations which are now embodied in Section 73.207 of the Commission's Rules. Indeed, the Commission so noted expressly in Miramar Beach, Florida supra, 6 FCC Rcd at 5779 n. 5. The old separation distances, now contained in Section 73.213(c) of the Rules, were based on maximum Class A station operations at an effective radiated power of 3.0 kW with an antenna height of 100 meters above average terrain. At the time that the Miramar Beach allotment was adopted on October 2, 1991, the allotment reference

Carters certainly must have known about this language in Miramar Beach, Florida, supra, since, as noted above, the Carters themselves were expressly recognized by the Commission in Miramar Beach, Florida as the parties who had petitioned for the allotment of the FM channel in Miramar Beach.

It should also be noted that the Commission addressed the issue of such grandfathered short-spacings in its Memorandum Opinion and Order in MM Docket No. 88-375, 6 FCC Rcd 3417 (1991), issued with respect to requests for reconsideration of its decision to increase the maximum power of Class A FM stations to 6 kW. The Commission therein expressly stated as follows:

"In a connected matter, we wish to clarify our policy regarding applications for construction permits filed to implement allotments resulting from petitions for rulemaking to amend the Table of FM Allotments filed prior to October 2, 1989 (the effective date of the new Class A spacing requirements). Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment. [Emphasis added.]"

6 FCC Rcd at 3418 n. 7.

Moreover, in Paragraph 40 of its Memorandum Opinion and Order in MM Docket No. 88-375, supra, the Commission stated that it

"... will permit facility enhancements sought pursuant to § 73.213 that retain current coverage in directions where overlap exists, provided no new predicted interference is created to the current service of any other short-spaced co-channel and adjacent channel licensees."

6 FCC Rcd at 3423.

It should be noted that both Dolgoff and the Carters have requested processing of their respective applications pursuant to the provisions of Section 73.213 of the Commission's Rules with respect to the spacing toward WKNV(FM) in Brewton, Alabama. Annexed hereto as Exhibit 1 is the Engineering Statement of William P. Suffa, Dolgoff's consulting engineer, who notes that the Dolgoff proposed transmitter site is located at a distance which satisfies the spacing requirement of Section 73.213(c) with respect to WKNV(FM). Mr. Suffa further notes that Dolgoff's proposed transmitter site is fully-spaced with respect to all other stations under Section 73.207 of the Commission's Rules.

III. Conclusion

In light of all the foregoing, it is clear beyond question that there is no merit whatsoever to the Carters' Petition To Deny Dolgoff's application. Manifestly, processing pursuant to Section 73.213(c) is proper, appropriate and fully sanctioned by the Commission. The Carters clearly knew this, yet they proceeded to file their completely frivolous Petition To Deny. These facts raise substantial and material questions of fact either as to whether the Carters are inept, or whether the Carters have engaged in abuse of process, and the Commission should take cognizance of these issues in its hearing designation order in this proceeding. In all events, however, the Carters' Petition To Deny should be summarily dismissed or denied.

Respectfully submitted,

HOWARD B. DOLGOFF

By: 

Irving Gastfreund

Kaye, Scholer, Fierman, Hays &
Handler

The McPherson Building

901 15th Street, N.W.

Suite 1100

Washington, D.C. 20005

(202) 682-3526

His Attorneys

July 8, 1992

Exhibit 1

Engineering Statement

Opposition to Petition to Deny

prepared for

Howard B. Dolgoff
Miramar Beach, Florida

This statement has been prepared on behalf of Howard B. Dolgoff ("Dolgoff"), applicant for a new FM station to serve Miramar Beach, Florida in support of his opposition to the Petition to Deny his pending application filed by Mark and Renee Carter ("Carter").

Carter argues that use of Section 73.213 of the FCC Rules and Regulations is inappropriate in connection with Dolgoff's proposal. However, such treatment is permitted under the Rules, and is consistent with the public interest as it permits maximum coverage for the Miramar Beach allotment.

Allotment Criteria

The Miramar Beach allotment was first proposed prior to October 2, 1989, before the adoption of the new distance separation requirements for class A stations now embodied in Section 73.207. The old separation distances, now contained in Section 73.213(c) of the FCC Rules, were based on maximum class A station operation of 3.0 kilowatts at 100 meters above average terrain. At the time that the Miramar Beach allotment was adopted, the allotment reference point did not satisfy the new (6 kilowatt) separations, but did satisfy the old separations now contained in Section 73.213. The Commission took cognizance of this in footnote to the Miramar Beach Report and Order by stating "Because this allotment is made as a result of a petition filed prior to October 2, 1989, applicants may avail themselves of Section 73.213(c) of the Commission's Rules, which allows use of the old, 3 kilowatt, class A distance separation requirements, with respect to WKNL(FM), Channel 292A, Brewton, Alabama...". This is exactly what Dolgoff has proposed to do.

The Commission also addressed the issue of such grandfathered allotments in its May 30, 1991 Memorandum Opinion and Order (MO&O) issued on reconsideration of the decision to increase the maximum power of Class A stations to 6 kilowatts. In that MO&O,

the Commission stated that applications for new allotments which result from petitions for rulemaking filed prior to October 2, 1989 must meet new, 6 kilowatt, spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short spaced on the effective date of the allotment (*See Footnote 7*). Further, paragraph 40 of the same MO&O states that the Commission will "...permit facility enhancements sought pursuant to Section 73.213 that retain current coverage in directions where overlap exists, provided no new predicted interference is created to the current service of any other short-spaced co-channel and adjacent channel licensees".

Both Dolgoff and Carter have applied for the Miramar Beach allotment pursuant to the provisions of Section 73.213 of the Commission's Rules. The Dolgoff site is located 105.2 kilometers from WKNU, Brewton, Alabama, which satisfies the spacing requirement of Section 73.213(c). As with Dolgoff, Carter is also seeking processing under the provisions of Section 73.213(c) with respect to WKNU. Dolgoff's site is located 105.2 kilometers from WKNU, where Section 73.213(c) requires separation of 105 kilometers. The Dolgoff site is fully spaced under Section 73.207 with respect to all other stations.

In addition to the Commission's explicit language in the Report and Order allotting the channel to Miramar Beach, Dolgoff relied on Paragraph 40 of the May 30, 1991 MO&O, which indicates that such coverage enhancement is permissible under Section 73.213 of the Commission's Rules. The Commission contemplated such enhancements by requiring applicants for new allotments to specify sites which meet the Section 73.207 (6 kilowatt) spacing requirement to all stations except those stations to which the new allotment reference point was short-spaced on the effective date of the allotment. Use of the provisions of Section 73.215 is not appropriate since Dolgoff is not proposing to offer protection to the contours of WKNU, as defined in that rule section. Dolgoff is, instead, relying on the protection afforded under the former distance separation requirements between 3 kilowatt class A stations which are now contained in Section 73.213(c). This is consistent with the treatment afforded non-directional facilities operating pursuant to that rule section. Operation of class A stations with directional antennas which restrict radiation

to 3 kilowatts was contemplated by the May 30, 1991 MO&O. Further, the ability to improve coverage in non-short spaced directions is in the public interest by virtue of the additional service which may be provided by higher power operation.

To satisfy the requirements of Section 73.213(c), Dolgoff has specified use of a directional antenna to restrict radiation from his facility to 3.0 kilowatts in the direction of WKNU. Since the Dolgoff proposal will radiate 3 kilowatts towards WKNU, at 100 meters above average terrain, it will not exceed the service or interference contours towards that station that would be created by a non-directional facility, such as that proposed by Carter. It should be noted that Carter's application specifies 3 kilowatt operation towards WKNU to meet the requirements of Section 73.213(c). Unlike non-directional antennas, which are subject to "pattern distortions" caused by side mounting, use of a directional FM transmitting antenna requires that the measured pattern be wholly contained within the proposed radiation envelope. In this case, since such measurements will ensure that the power radiated towards WKNU is 3 kilowatts or less, the Commission is assured that this facility will not create or receive interference greater than that contemplated in the Rules. By contrast, no such assurances exist with respect to the non-directional technical facilities proposed in Carter's application.

Conclusion

In sum, the Dolgoff technical proposal is consistent with the provisions of Section 73.213 of the Commission's Rules, the MO&O that adopted those Rules, Paragraph 40 of the Commission's May 30, 1991 MO&O, and the Report and Order allotting the channel to Miramar Beach.



William P. Suffa, P.E.

July 9, 1992

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that on this 9th day of July, 1992, I have caused a copy of the foregoing Opposition To Petition To Deny to be sent via first-class United States mail, postage prepaid, to the following:

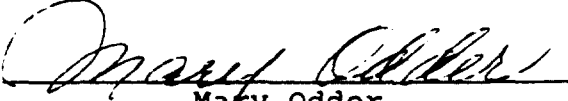
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Mary Odder

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that on this 12th day of July, 1993, have caused a copy of the foregoing "Opposition To Request To Certify Application For Review" be hand-delivered or to be sent via first-class United States mail, postage prepaid, to the following:

Honorable John M. Frysiak*